

# When Unsolicited Information Comes Over The Transom

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*[Note: In the February 2001 issue of NYPRR, Marvin Frankel and Ronald Adelman discussed proposed ABA Model Rule 1.18, which deals generally with a lawyer's duties to a prospective client. This article discusses Formal Opinion 2001-01 of the New York City Bar which reaches a conclusion contrary to the conclusion of the ABA Commission which proposed the new Model Rule.]*

Many law firms now maintain sophisticated web sites which encourage response by prospective clients. These sites offer biographies of all the lawyers in the firm and list their professional accomplishments, interests and activities. Some sites also list both present and former clients of the firm. Some encourage e-mail response through an Internet link. It should not come as a surprise, therefore, that prospective clients often respond by contacting the firm through e-mail or by fax or mail; nor should it come as a surprise that these prospective clients will occasionally disclose in their communications information harmful to their own interests but potentially helpful to an existing or former client of the firm.

What happens when a prospective client, whether in response to the lawyer's website or through some other medium, unilaterally transmits unsolicited information about a prospective lawsuit adverse to an existing or former client of the lawyer? Specifically, can the lawyer represent the existing client against the prospective client? Can the lawyer disclose the unsolicited information to the existing client or use it for the benefit of the existing client? Both these questions were answered in Formal Opinion 2001-1, issued on March 1, 2001 by the Professional and Judicial Ethics Committee of the Association of the Bar of the City of New York.

## **Does Unsolicited Information Disqualify Lawyer?**

A cornerstone of the attorney-client relationship is the obligation of the lawyer to protect the confidences and secrets of the client. This duty is embodied in both New York's DR 4-101 and the ABA's Model Rule 1.6. But neither the ABA Model Rules of Professional Conduct nor the New York Code expressly extends the duty of confidentiality to a would-be or prospective client. [Note: This gap in the Model Rules would be filled by proposed Model Rule 1.18, *supra*.]

In Formal Opinion 2001-1, the City Bar cited authority which would extend the lawyer's duty of confidentiality to certain information imparted by a prospective client. The Opinion quoted ABA Formal Opinion 90-358, which opined that an attorney is obligated "to protect information imparted by a would-be client seeking to engage the lawyer's services even though no legal services are performed and the representation is declined." (Emphasis added.)

Increasingly, clients are interviewing several law firms before selecting counsel. These clients often conduct so-called “beauty contests,” in which competing lawyers permit themselves to be interviewed and measured. If the lawyers who submit to inspection fail to take appropriate precautions to avoid receiving confidential information, they may find themselves disqualified from representing another party to the matter — even if the would-be client decides to retain a different law firm. *See generally*, Report of the Committee on Professional Responsibility, Association of the Bar of the City of New York, “Ethical Issues in Beauty Contests,” 48 *The Record of the Association of the Bar of the City of New York* 1003 (Dec. 1993); B. Kirman & M. Romey, “When A Beauty Contest Turns Ugly,” *Business Law Today*, March/April 1992, at 18.

However, the City Bar distinguished “beauty contests” and other pre-engagement communications in which a lawyer participates voluntarily, from those situations in which the would-be client transmits information unilaterally and without solicitation.

It does not follow, however, that the duty of confidentiality that may apply to a prospective client necessarily mandates that a law firm be disqualified from representing an existing client in the matter whose interests are adverse because a prospective client unilaterally transmits confidential information to the law firm. (Formal Opinion 2001-1 at 3, reprinted in *The Record of the Association of the Bar of the City of New York* (Winter 2001), at 102 (emphasis added).)

Accordingly, the Opinion concluded that a law firm is not disqualified from representing an existing client in the matter when it receives confidential information from a would-be client that the firm did not solicit or authorize.

We believe, however, that there is a vast difference between the unilateral, unsolicited communication at issue here by a prospective client to a law firm and a communication made by a potential client to a lawyer at a meeting in which the lawyer has elected voluntarily to participate and is able to warn a potential client not to provide any information to the lawyer that the client considers confidential.

### **Disclosing Or Using Unsolicited Information**

After concluding that a law firm is not disqualified by the receipt or review of unsolicited information from accepting an engagement against the prospective client in the same matter, the Committee turned its attention to the tricky issue of what use, if any, the law firm could make of the unsolicited information.

New York’s DR 4-101 mandates that a lawyer not reveal a client’s confidences or secrets and not use a client’s confidences or secrets “to the disadvantage of the client.” A “secret” is a broad category comprised of all “information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” (DR 4-101(A).) A “confidence,” which is generally a narrower category of information than a “secret,” is defined as “information protected by the attorney-client privilege under applicable law.” (*Id.*)

Unsolicited information unilaterally transmitted by a prospective client cannot be a “secret,” because no “professional engagement” exists when the prospective client transmits unsolicited information unilaterally. But can the unsolicited information be deemed a “confidence” protected by the attorney-client privilege?

The New York cases and authorities apply the attorney-client privilege to communications with prospective clients and hold that initial statements made when a prospective client in good faith intends to employ a lawyer are privileged, even though the lawyer ultimately declines the engagement. *United States v. Dennis*, 843 F.2d 652, 656-57 (2d Cir. 1988); *United States v. Devery*, 93 Cr. 273 (LAP), 1995 WL 217529, at 5 (S.D.N.Y. Apr. 12, 1995); *Bennett Silvershein Assocs. v. Furman*, 776 F. Supp. 800, 803 (S.D.N.Y. 1991). See also McCormick, *Evidence* § 88 at 352 (5th ed. 1999) (“Communications in the course of preliminary discussion with a view to employing the lawyer are privileged though the employment is in the upshot not accepted.”); Weinstein, Korn and Miller, 9 *New York Civil Practice*, CPLR, ¶ 4503.12 (Matthew Bender & Co. 2000) (citing 8 Wigmore, *Evidence* § 2304 (McNaughton rev. ed. 1961)).

Relying on these authorities, the potential harm to the prospective client, and, especially, the strong policy to encourage clients to seek counsel, the City Bar held that information unilaterally transmitted to a lawyer by a prospective client in good faith could not be used against the would-be client:

Thus, in the situation presented here, we believe that prospective clients who approach lawyers in good faith for the purposes of seeking legal advice should not suffer even if they labor under the misapprehension that information unilaterally sent will be kept confidential. Although such a belief may be ill conceived or even careless, unless the prospective client is specifically and conspicuously warned not to send such information, the information should not be turned against her. Indeed, we see no reason that the other client should be benefited by the fortuitous circumstances that the lawyer approached by the prospective client turned out to be the same lawyer retained by the adverse party.

### **Conflict With Proposed ABA Model Rule 1.18**

Significantly, the conclusion reached in Formal Opinion 2001-1 that information transmitted by a prospective client — even if it is sent unilaterally — cannot be turned against the would-be client conflicts directly with the new ABA Model Rule 1.18 proposed by the ABA’s Ethics 2000 Commission. Proposed Rule 1.18 directs that “a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation. . . .” But the proposed Rule defines a “prospective client” as “someone who discusses with a lawyer the possibility of forming a client-lawyer relationship. . . .” The stated purpose for defining a “prospective client” in this way is to “limit[] circumstances to which the Rule applies.” (Reporter’s Explanation of Changes, cmt.1.) The reason for limiting the definition of prospective clients to those who have had a discussion with a lawyer is expressed in Comment 2:

Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a “prospective client” within the meaning of paragraph (a).

In rejecting the result under proposed MR 1.18, the City Bar acknowledged:

It could be reasonably, if not forcefully, argued that the prospective client's cavalier treatment of her own information undermines any bona fide claim that others should be required to afford it confidentiality protection, and the lawyer's obligation of zealous advocacy would suggest that a lawyer should be able to exploit the prospective client's mistake and make available to another client everything he learns.

Nevertheless, the Ethics Committee decided that the strong policy of encouraging clients to seek legal advice warrants a different result:

[W]e believe that the strong policy of encouraging clients to seek legal advice, fortified by the New York rule generally protecting pre-retention communications, warrants protecting the information in this case — especially given the absence of any warning against the disclosure of confidential information posted on the web site.

### **Curbing The Cross-Examiner**

The twin conclusions reached by the Ethics Committee — (1) that the lawyer receiving the unsolicited information is not disqualified from representing a current client with adverse interests, but (2) that he cannot disclose the information or use it to benefit the current client — can produce situations in which the lawyer must curb his natural instinct at zealous and unfettered advocacy. Suppose, for example, that the unsolicited information would help in effective cross-examination of the prospective client at trial. Under the City Bar's Opinion, the lawyer would not be prevented from cross-examining the prospective client, but he would be prohibited from utilizing the fruits of the communication in any way, including to assist in the cross-examination.

The City Bar's Ethics Committee specifically considered this circumstance and found that it did not warrant a different conclusion. It likened the receipt of unsolicited information from a prospective client to other circumstances in which a lawyer comes into possession of confidential or privileged information (e.g., when a lawyer receives inadvertently produced privileged information during the course of a litigation) and is precluded from exploiting it on behalf of the client. The Ethics Committee relied on ABA Formal Opinion 92-368 (1992) which states: "[T]here are many limitations on the extent to which a lawyer may go 'all out' for the client." The opinion also notes: "[F]irst, [inadvertent] disclosure to counsel does not have to result in disclosure to counsel's client. Second, there is a significant difference between a lawyer's knowing the contents of documents and that lawyer's being able to use them, for example, at trial either as a basis for questions or by presentation of them to a fact finder."

A law firm which wants to discourage the receipt of unsolicited information which might prove injurious to its existing clients should install an "adequate disclaimer" on its web site. An adequate disclaimer is

...one that permanently and specifically warns prospective clients not to send any confidential information in response to the web site because nothing will necessarily be treated as confidential until the prospective client has spoken to an attorney who has completed a conflicts check...

If such a disclaimer is used and a prospective client insists on sending confidential information to the firm through the web site, "then no protection would apply to that information and the lawyer would be free to use it as she sees fit."

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